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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SUNNY HSIAO SHIN TING,

Defendant and Appellant.

B209911

(Los Angeles County
Super. Ct. No. BA253204)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Robert J. Perry, Judge. Reversed in part, affirmed in part.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Sunny Hsiao Shin Ting appeals from a judgment entered after a jury returned a guilty verdict against him for count 1, first degree murder (Pen. Code, § 187, subd. (a))¹ and count 2, first degree robbery (§ 211). The jury found true the special circumstance that appellant committed the murder during the commission of a robbery within the meaning of section 190.2, subdivision (a)(17). The jury found true as to count 1 and count 2 that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a) and that a principal was armed with a firearm during the commission of the offenses within the meaning of section 12022, subdivision (a)(1).

The trial court sentenced appellant on count 1 to life without the possibility of parole, plus a four-year enhancement for the personal use of a firearm (§§ 190, subd. (a); 12022.5, subd. (a)). Sentence for the principal armed finding was stayed (§ 1170.1, subd. (f)). Sentence for the robbery count was stayed pursuant to section 654.

The judgment of conviction on count 2, robbery is reversed. In all other respects, the judgment is affirmed.

CONTENTIONS

Appellant contends that: (1) the trial court erred when it denied his motion for a continuance to secure new counsel; (2) the trial court abused its discretion when it refused to grant appellant's motion for new trial; and (3) the robbery conviction must be reversed because prosecution of that offense was barred by the statute of limitations.

FACTS AND PROCEDURAL BACKGROUND

The Proceedings

On August 20, 1992, In Jik Lee (Lee), a taxi driver, was shot and killed while picking up a fare at a restaurant in the Korea Town neighborhood of Los Angeles. On July 20, 2005, appellant was convicted of the murder and robbery of Lee. On April 7, 2006, the trial court granted appellant's motion for new trial based on juror misconduct.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On July 27, 2006, appellant's retained counsel, Jack Earley (Earley), withdrew and a public defender was appointed. Appellant then retained attorney Nancy Mazza (Mazza) to represent him. She was substituted in the place of the public defender on December 20, 2006. On June 25, 2007, the trial court denied Mazza's motion for a 30-day continuance. On July 3, 2007, two days prior to the scheduled commencement of the second trial, appellant, still represented by Mazza, filed a motion by facsimile "in propria persona" for a continuance to retain new counsel. At the hearing on July 5, 2007, the trial court denied the motion. Trial began on July 5, 2007 and the second jury convicted appellant of the same charges.

The Trial Testimony

On August 20, 1992, between 1:00 a.m. and 2:00 a.m., Hyun Suk Yang (Yang), the owner of an unlicensed taxi service, dispatched Lee in response to a call. Like other unlicensed drivers, Lee used his personal car. Thirty minutes after Lee was dispatched, Yang was unable to reach him by walkie-talkie.

The manager of an apartment on New Hampshire Street and two other witnesses who lived near the shooting testified that they heard a gunshot, looked out their windows, and saw people arguing in a car. The men were speaking an Asian language. There was a passenger in the front seat and a passenger in the backseat behind the driver. The witnesses testified that they heard another gunshot and saw a gun flash from the backseat of the car. The front passenger door was opened, and the passenger stuck his leg outside the car. He was holding a gun dangling from his finger. The man in the backseat got out of the car, and ran back and forth with a gun in his hand. The driver was slumped over the steering wheel. The man from the backseat then went to the driver's side, opened the door, pulled out the driver, and dumped his body in the road and threw a walkie-talkie on the ground. That man then got into the driver's seat and drove away.

On August 20, 1992, at 2:32 a.m., appellant's girlfriend drove him to the Monterey Park Hospital. He was treated for a bullet wound in his leg. Appellant told the police and hospital staff that he had been robbed and shot while sitting in the passenger side of

his girlfriend's car. Monterey Park Police Department Officer Edward Riojas inspected the girlfriend's car but did not find any blood in it.

On August 21, 1992, a Los Angeles County Sheriff's Department deputy sheriff responding to a call found Lee's burning car in East Los Angeles. There was a nine-millimeter shell casing on the rear floorboard.

In 1996 and 1997, Andy Yu (Yu) and Tim Chen, two incarcerated members of the Wah Ching gang, told the police about Lee's murder. At trial, Enoch Liao (Liao), Bin Kao (Kao), and Hung Ly (Ly) former members of the Wah Ching gang, testified that appellant was the leader of the Wah Ching gang at the time of the murder. Appellant told them that he and another Wah Ching gang member, Kenny Lee (Kenny) tried to carjack Lee. When Lee fought back, appellant accidentally shot himself with his own gun. Kenny then shot Lee in the back of the head. Appellant did not say that Lee had a gun. He told one of the gang members that he had a nine-millimeter Ruger with him during the shooting. Liao testified that Kenny said that he and appellant wanted to use Lee's car to rob some whorehouses or use it for a jewelry heist. Ly testified that appellant told him he got shot while he and Kenny were trying to get a car to use for robberies.

Yu testified that prior to the murder, appellant, Kenny, Yu, and three other gang members met at appellant's apartment in Monterey Park to plan a jewelry store robbery. Appellant and Kenny left to get a car for the robbery. Both appellant and Kenny had guns. Kenny had a nine-millimeter Beretta and appellant may have had a nine-millimeter silver Glock. Two or three hours after they left the apartment, appellant and Kenny returned. Kenny said he had shot appellant by accident. At the hospital, appellant told Yu that Kenny had pulled a gun on Lee. Appellant said that during the ensuing struggle, Kenny shot appellant in the leg. Kenny then shot Lee in the head.

As in the first trial, appellant testified in his own defense. He testified that he did not carjack Lee or intend to steal a car to commit jewelry store or whorehouse robberies. Appellant testified that he sold guns to Korean store owners. In August 1992, Kenny told appellant that he owed Lee money. Lee was interested in buying guns and Kenny

arranged a meeting among the three of them. The meeting took place in Lee's car. Appellant sat in the front passenger seat, and Kenny sat in the rear. Appellant did not have a gun. Lee and Kenny spoke in Korean, which appellant does not understand. The two men began arguing and Lee stopped the car. He pulled out a gun. Appellant grabbed the barrel of the gun and struggled with Lee. The gun went off and appellant was shot in the leg. Appellant heard a shot and saw Lee slumped over the steering wheel. He realized Kenny had shot Lee. Appellant picked up Lee's gun and dangled it from his fingertip so that he would not get fingerprints on it. Kenny pulled Lee's body out of the car, then drove appellant home in Lee's car. Appellant's girlfriend took appellant to the hospital.

Lee's wife testified that Lee had never owned a gun, she did not recognize Kenny by his photograph, and Lee had not loaned money to Kenny.

DISCUSSION

I. The trial court did not abuse its discretion when it denied appellant's motion for a continuance to substitute retained counsel

A. The trial court did not abuse its discretion in refusing to allow appellant to argue his motion

Appellant first contends that the trial court committed reversible error when it refused to allow appellant to address the court to explain why he should be granted a continuance. We disagree. Appellant was represented by retained counsel and had no right to directly address the court on a motion for a continuance. Furthermore, the requirements of *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), cited by appellant, do not apply here.

“[A] capital defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally or to act as cocounsel at trial.” (*In re Barnett* (2003) 31 Cal.4th 466, 472.) “There is, however, one exception to the rule that motions of parties represented by counsel must be filed by such counsel: courts must ‘accept and consider pro se motions regarding representation, including

requests for new counsel.’ (Cf. *Marsden*, *supra*, 2 Cal.3d 118.) Such motions must be clearly labeled as such, and must be limited to matters concerning representation. [Courts] will not consider extraneous matters even in such documents unless submitted by counsel.” (*People v. Harrison* (2001) 92 Cal.App.4th 780, 788–789, citing *People v. Clark* (1992) 3 Cal.4th 41, 173.) An indigent defendant, represented by appointed counsel, must be afforded a hearing pursuant to *Marsden* to determine whether substitution of counsel is necessary, and why the denial of such would substantially impair his constitutional right to the assistance of counsel; the hearing must be held in open court or during an in camera session without the presence of the prosecutor. (*People v. Ortiz* (1990) 51 Cal.3d 975, 990; *People v. Winbush* (1988) 205 Cal.App.3d 987, 991 (*Winbush*).)

But *Marsden* is not applicable when the defendant is represented by retained counsel. (*People v. Lau* (1986) 177 Cal.App.3d 473, 478.) Appellant in this case was represented by retained counsel. Moreover, we note that he made a motion for a continuance, rather than a motion to substitute counsel.

Appellant’s citation to *Winbush*, *supra*, 205 Cal.App.3d at page 990, for the proposition that the trial court improperly refused to allow him to address the court does not assist him. First, the *Winbush* case concerned the defendant’s request for substitution of *appointed* counsel under *Marsden* rather than a continuance. Second, the sole issue in that case was whether the trial court erred by refusing to consider the defendant’s written request for new counsel to argue a motion for new trial. (*Winbush*, *supra*, at p. 989.)

Here, appellant filed a detailed, well-written motion for a continuance under section 1050, subdivision (b),² supported by points and authorities and a declaration. Although the court was not required to consider his motion or allow him to orally address

² Section 1050, subdivision (b) permits a motion for a continuance, supported by affidavits and declarations, to be filed within two court days of the hearing sought to be continued.

the court in a *Marsden* type hearing, the record shows that the trial court considered the motion and addressed the arguments raised.

At the hearing on appellant's motion for a continuance on July 5, 2007, the day set for commencement of trial, the People represented that its witnesses were ready and it opposed a further continuance. Mazza, appellant's attorney, objected to appellant addressing the court expressing concern that he might waive the attorney-client privilege. Mazza argued that if appellant wanted to represent himself in propria persona, rather than substitute retained counsel, he could have a hearing in chambers. She also noted that appellant was not entitled to a *Marsden* hearing because she was retained rather than appointed counsel. Noting that it had read appellant's motion, that it accepted appellant's retained counsel's representations, and that 65 jurors would be ready for jury selection in 45 minutes, the trial court denied appellant's motion.

We conclude the trial court did not err in refusing to allow appellant to address the court on a motion for a continuance. Although it was under no obligation to do so, the trial court carefully considered the motion and the declarations as well as the arguments of counsel.

B. The trial court did not abuse its discretion in denying appellant's motion for a continuance

Appellant contends that he was entitled to a continuance to obtain new counsel because he was not unjustifiably dilatory in choosing to substitute counsel and did not make his decision to do so arbitrarily. As previously discussed, the trial court was not obligated to consider appellant's motion for a continuance. In any event, we conclude that the trial court did not abuse its discretion in denying appellant's motion for a continuance because appellant failed to make a timely request and a continuance would have disrupted the orderly process of justice.

A retained counsel may be discharged by a defendant at any time with or without cause. (*People v. Ortiz, supra*, 51 Cal.3d at pp. 982–983.) But a defendant's right to discharge his retained counsel is not absolute. The trial court, in its discretion, may deny

such a motion if discharge will result in “‘significant prejudice’ to the defendant [citation] or if it is not timely, i.e., if it will result in ‘disruption of the orderly processes of justice.’” (*Id.* at pp. 983–984.) “Generally, the granting of a continuance is within the discretion of the trial court. [Citation.] A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*People v. Courts* (1985) 37 Cal.3d 784, 790–791.) The reviewing court looks to the circumstances of each case in determining whether the trial court abused its discretion in denying the motion for a continuance. (*Id.* at p. 791.) No abuse of discretion occurs if the trial court denies a continuance at the commencement of trial where the defendant has been provided a reasonable opportunity to obtain counsel of his own choice. (*People v. Blake* (1980) 105 Cal.App.3d 619, 624; *People v. Doebke* (1969) 1 Cal.App.3d 931, 939 [trial court’s denial of two-week continuance for the convenience of new trial counsel was not an abuse of discretion where the motion had been made only one court day before the date set for trial, defendant had been dilatory in obtaining new counsel, a jury panel had been summoned to appear, prosecution witnesses had been subpoenaed, and a continuance would have disrupted the civil and criminal trial calendar].)

Here, the record shows that the trial court read appellant’s motion, heard the arguments of counsel, and exercised its discretion in concluding that appellant’s motion to continue was not timely and would result in a disruption of justice. On appeal, appellant reiterates the arguments in his motion that Mazza did not possess certain documents and did not spend enough time with appellant. At the hearing, Mazza represented that she had received appellant’s motion two days before trial was to commence, late in the afternoon. Mazza was completely surprised by appellant’s motion. She stated that appellant’s complaints were unfounded. She possessed every item that appellant claimed she did not have, including copies of the preliminary hearing, a document generated by Earley to show the chain of custody of evidence, Kenny’s transcript, and appellant’s transcript. She also addressed the issue of a witness mentioned

in appellant's motion. She testified that the witness was not willing to testify, and was overseas. She stated that the court had no jurisdiction over the witness. She also possessed copies of Earley's trial notebook. She represented that she was ready for trial and had visited appellant over 30 times to prepare for trial. She also acknowledged that although she had asked for a 30-day continuance 10 days earlier, she was now prepared to go to trial. Mazza stated that after the trial court denied Mazza's motion for a continuance, she did everything possible to prepare for trial. The trial court stated that it read and considered appellant's motion and accepted Mazza's representation that she was ready for trial.

Appellant also urges on appeal that a continuance would not have significantly inconvenienced the court, the parties, or the witnesses and that he took reasonable and timely steps to secure new counsel. He contends that a four-week continuance would have been a practical remedy. However, at the hearing on June 25, 2007, the trial court explained that appellant was being retried, Earley had conducted a thorough cross-examination of the witnesses and had tried the case well, most of the same witnesses would testify, those not available would be presented by transcript, and that 10 days was ample time for Mazza to prepare for trial. Furthermore, as previously discussed, the court, the witnesses, and counsel were prepared to commence trial on July 5, 2007. Immediately after the trial court denied appellant's motion, the jury panel was sworn and jury selection began.

We find no abuse of discretion in the trial court's denial of appellant's motion for a continuance.

II. The trial court did not abuse its discretion in denying appellant's motion for new trial

Appellant contends that the trial court abused its discretion in denying his motion for new trial. We disagree.

"In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the

correctness of the verdict and proceedings supporting it. [Citation.] The trial court ‘should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.’ [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. “‘The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’” [Citation.]” (*People v. Davis* (1995) 10 Cal.4th 463, 523–524.)

Citing section 1181,³ appellant claims that the trial court “‘erred in the decision of [a] question of law arising during the course of the trial’” when it denied appellant’s motion for a continuance to secure a new lawyer. He reiterates the arguments discussed in part 1, *supra*, that the trial court improperly refused to hear his arguments why he should be granted a continuance. He also contends that he had not made an arbitrary decision to replace Mazza, he was not dilatory in seeking to replace her, the continuance was not filed solely for delay, and a 30-day continuance would not have resulted in an unreasonable disruption of the proceedings. In support of his arguments he contends that Mazza breached promises that she would consult with appellant, retain experts, retain a jury consultant, and use visual aids. He contends that he lost confidence in Mazza after a heated exchange one week prior to trial. He asserts his family then contacted another defense attorney who prepared the motion for a continuance on his behalf.

The record shows that the trial court carefully considered all moving papers and oral argument. The trial court noted that it reviewed the motion for new trial, the

³ Section 1181 provides, in pertinent part: “When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 5. When the court . . . has erred in the decision of any question of law arising during the course of the trial. . . .”

opposition, and the reply. It also reread appellant's motion filed on July 3, 2007. Appellant's counsel submitted on his moving papers. The People argued that the trial court did not err in denying the motion for a continuance in the first place because the lengthy passage of time from the crime to the current trial meant that witnesses were becoming unavailable and memories were fading. The People pointed out that one of the witnesses available for the first trial was unavailable for the second and that some witnesses were elderly. The trial court then concluded that it had properly denied the motion for a continuance in the first instance and also noted that appellant was well represented.

In addition to the discussion in part I finding no abuse of discretion in the trial court's refusal to allow appellant to address the court and in denying his motion for a continuance, we further conclude that the trial court did not abuse its discretion in denying the motion for new trial.

III. Statute of limitations

Appellant contends that the robbery charge was barred by the three-year statute of limitations. We must remand the matter for a hearing on whether the statute of limitations bars appellant's conviction for count 2, robbery.

“[W]hen the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing.” (*People v. Williams* (1999) 21 Cal.4th 335, 338.)

Section 801 provides that “prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense.” Robbery of the first degree is punishable by imprisonment in the state prison for three, four, or six years. (§ 213, subd. (a)(1).) Robbery does not come within section 799, which provides no time limit for the prosecution of an offense punishable by death or life imprisonment, or section 800 which provides that offenses punishable by

imprisonment in the state prison for eight years or more must be prosecuted within six years after commission of the offense. Therefore, a three-year statute of limitations applies to robbery. (*People v. Morris* (1988) 46 Cal.3d 1, 13–19, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

The robbery and murder occurred in 1992. An information was filed on August 11, 1997 in case No. BA146120, charging appellant with count 1, murder in violation of section 187, subdivision (a) with the allegation that it was committed during a robbery, within the meaning of section 190.2, subdivision (a)(17) and count 2, robbery in violation of section 211.⁴ The information alleged that those crimes occurred on August 20, 1992. Case No. BA146120 was dismissed on October 14, 1997 pursuant to section 1382.

The information in the current case was filed on April 7, 2004 charging appellant with count 1, murder in violation of section 187, subdivision (a) with the allegation that it was committed during a robbery, within the meaning of section 190.2, subdivision (a)(17) and count 2, robbery in violation of section 211 alleging crimes committed on August 20, 1992.⁵

Neither party raised the statute of limitations issue before the trial court and we cannot ascertain from the charging documents whether circumstances exist that would

⁴ The information also alleged as to counts 1 and 2 that appellant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a), causing the offense to become a serious felony pursuant to section 1192.7, subdivision (c)(8) and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

⁵ The information erroneously described the robbery as occurring on August 20, 2003, when it actually occurred on August 20, 1992. The information also alleged that as to both counts, a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1), and that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a) causing the offense to become a serious felony pursuant to section 1192.7, subdivision (c)(8).

make the action timely. While “a silent record is partly the defendant’s fault for not raising the issue at trial,” it is “the prosecution’s fault in the first instance for filing an information that, on its face, was untimely.” (*People v. Williams, supra*, 21 Cal.4th at p. 345.) The prosecutor has full control over the charging document, and the district attorney could easily allege in the information either that an arrest warrant issued before the time period had expired, or the action was filed timely after discovery of the crime, or that the defendant has been absent from the state. (*Id.* at pp. 344–345.)

Where, as here, the appellate court cannot conclude from the face of the charging document that the action is time-barred, our Supreme Court has determined that the fair solution is to remand the matter to determine whether the action is timely. (*People v. Williams, supra*, 21 Cal.4th at p. 345.)

The matter must be remanded for hearing on whether appellant’s robbery conviction in count 2 is barred by the statute of limitations.

DISPOSITION

The judgment with respect to count 2, robbery, is reversed with directions to the trial court to conduct a hearing to determine whether the statute of limitations bars prosecution of count 2, robbery. If the trial court determines that the robbery charge is not barred by the statute of limitations, it shall reinstate the judgment appealed from or take other lawful proceedings to give effect to the verdicts heretofore returned. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ